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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. JAMES WARD CHAPMAN III, Petitioner.	2 CA-CR 2012-0281-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF MARICOPA COUNTY

Cause No. CR2007145743001SE

Honorable Helene Abrams, Judge

REVIEW GRANTED; RELIEF DENIED

William G. Montgomery, Maricopa County Attorney
By Lisa Marie Martin — Phoenix
Attorneys for Respondent

James W. Chapman III — Florence
In Propria Persona

K E L L Y, Judge.

¶1 Petitioner James Chapman seeks review of the trial court's order summarily dismissing his petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *See*

State v. Swoopes, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Chapman has not met his burden of establishing such abuse here.

¶2 After a jury trial, Chapman was convicted of child molestation and sexual abuse, and the trial court sentenced him to a presumptive, seventeen-year prison term for child molestation and placed him on lifetime probation for sexual abuse. His convictions and sentences were affirmed on appeal. *State v. Chapman*, No. 1 CA-CR 08-0397 (memorandum decision filed Jul. 9, 2009). Chapman filed a notice of post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record and had been "unable to find any claims for relief to raise in post-conviction relief proceedings."

¶3 Chapman then filed a pro se petition for post-conviction relief with a supporting affidavit, asserting his trial counsel had been ineffective because she did not advise him that it was his choice whether to testify and "took it upon herself to waive [his] . . . right to testify" despite his repeated requests that he do so. He asserted that, had he been properly advised, he would have testified on his own behalf that the victim had a motive to lie, "had a history of lying and manipulating situations to get what she wanted," and "had made prior false allegations of sexual abuse against another individual." He also asserted he would have "explained the reasons why he had made . . . incriminating statements" to police, namely that he had felt intimidated during the interview.

¶4 The trial court summarily dismissed Chapman's petition. The court noted it had advised Chapman during a settlement conference that it was "completely up to [him]" whether to exercise his right to testify and that Chapman had failed to explain "how [he] was precluded from testifying." Thus, the court concluded, he had not demonstrated counsel had been deficient. The court further concluded there was no

showing of prejudice, stating Chapman had not provided any specifics "as to the testimony [he] would have given that was in addition to or different from that which was presented to the jury" concerning the victim's purported tendency to lie and had not provided "any specific testimony" concerning why he had made incriminating statements to police.

¶5 On review, Chapman argues he presented a colorable claim and the trial court erred in dismissing his claim without an evidentiary hearing. "To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel's performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant." *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). "A colorable claim of post-conviction relief is 'one that, if the allegations are true, might have changed the outcome.'" *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). And if a defendant fails to make a sufficient showing on either element, the court need not determine whether the other element was satisfied. *State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶6 Chapman first asserts that the trial court's statement to him at a settlement conference was insufficient to inform him that the choice whether to testify was his choice and not his counsel's. We disagree. The court unequivocally informed Chapman he had the right to testify and it was "completely up to [him]." Chapman does not explain what additional information was needed for him to be informed adequately that it was his choice whether he testified. Although Chapman asserted in his affidavit he was unaware he had that choice, to state a colorable claim, he must do more than contradict

what the record plainly shows. *See State v. Jenkins*, 193 Ariz. 115, ¶ 15, 970 P.2d 947, 952 (App. 1998) (defendant's claimed unawareness that sentence "must be served without possibility of early release" not colorable when "directly contradicted by the record").

¶7 And we agree with the trial court that Chapman did not adequately explain how his counsel precluded him from testifying. Chapman stated in his affidavit that his trial counsel "took it upon herself to waive [his] right to testify." But nothing in the record shows counsel affirmatively waived Chapman's right to testify or did anything else to prevent him from doing so—at the close of the state's case, counsel moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., and, upon the denial of that motion, stated only that the "[d]efense rests." Beyond avowing he was unaware he had the choice to testify—a statement clearly belied by the record—Chapman offers no explanation for his failure to assert his right to testify in his own defense. *Cf. State v. Prince*, 226 Ariz. 516, ¶¶ 45-46, 250 P.3d 1145, 1160 (2011) ("on-the-record waiver" of right to testify not required and defendant "could have [personally] expressed" desire to testify); *State v. Tillery*, 107 Ariz. 34, 37, 481 P.2d 271, 274 (1971) ("Were defendant's desires to testify in his own behalf as strong and unrelent[ing] as he now claims they were, he would not have maintained his silence throughout the entire trial. He might very easily have directed his request to the court or made motion to have his attorney removed.").

¶8 Chapman's conclusory and unsupported assertion that counsel prevented him from testifying by waiving his right to do so is not sufficient to establish a colorable claim. *See State v. Donald*, 198 Ariz. 406, ¶ 21, 10 P.3d 1193, 1201 (App. 2000) (to

warrant evidentiary hearing, Rule 32 claim "must consist of more than conclusory assertions"); *see also State v. McDaniel*, 136 Ariz. 188, 198, 665 P.2d 70, 80 (1983) (claimant bears burden of establishing ineffective assistance of counsel and "[p]roof of ineffectiveness must be a demonstrable reality rather than a matter of speculation"). Chapman did not invoke his right to testify and, absent proof of some affirmative conduct by counsel that prevented him from doing so, he cannot now blame counsel for that decision. *See State v. Schurz*, 176 Ariz. 46, 58, 859 P.2d 156, 168 (1993) (regretting decision not to testify insufficient to raise colorable claim of ineffective assistance; defendant must show unawareness of right to testify or counsel's deprivation of right).

¶9 For the reasons stated, although review is granted, relief is denied.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge